

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK and  
SARA ANN MAKENZIE,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF  
HEALTH SERVICES and  
LINDA SEEMEYER, in her official capacity  
as Secretary of the Wisconsin Department  
of Health Services,

Defendants.

Case No. 3:18-cv-00309-wmc  
Judge William Conley

**DECLARATION OF ORLY T. MAY, ESQ.**

I, Orly T. May, declare as follows:

1. I am an attorney for Plaintiffs Cody Flack and Sara Ann Makenzie in the above-captioned case. I submit this declaration in connection with Plaintiffs' Motion for Preliminary Injunction.

2. Exhibit 1 to this Declaration is a true and correct copy of American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, "Gender Dysphoria" 451-459 (5th ed. 2013).

3. Exhibit 2 to this Declaration is a true and correct copy of the December 2011 Committee Opinion of the Committee on Health Care for Underserved Women of The American College of Obstetricians and Gynecologists, entitled, "Health Care for Transgender Individuals" (2011).

4. Exhibit 3 to this Declaration is a true and correct copy of the American Psychiatric Association's Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012).

5. Exhibit 4 to this Declaration is a true and correct copy of the American Psychological Association's resolution, entitled, "Transgender, Gender Identity, & Gender Expression Non-Discrimination" (2008).

6. Exhibit 5 to this Declaration is a true and correct copy of the American Medical Association's policy, "Clarification of Medical Necessity for Treatment of Gender Dysphoria H-185.927) (last modified in 2016).

7. Exhibit 6 to this Declaration is a true and correct copy of the American Medical Association's policy, "Removing Financial Barriers to Care for Transgender Patients H-185.950" (last modified in 2016).

8. Exhibit 7 to this Declaration is a true and correct copy of the American Medical Association's Resolution: 122 (A-08), entitled, "Removing Financial Barriers to Care for Transgender Patients."

9. Exhibit 8 to this Declaration is the American Association of Family Physician's Resolution No. 1004, entitled, "Transgender Care" (May 3, 2012).

10. Exhibit 9 to this Declaration is a true and correct copy of the Endocrine Society's Position Statement on Transgender Health (September 2017).

11. Exhibit 10 to this Declaration is a true and correct copy of State of Wisconsin, Legislative Fiscal Bureau, Joint Committee on Finance, *Medical Assistance Cost-to-Continue (Health Services -- Medicaid Services) (Paper #320)* (May 25, 2017).

12. Exhibit 11 to this Declaration is a true and correct copy of DHS, *Current Month Health Enrollment At A Glance* (April 2018), available at <https://www.forwardhealth.wi.gov/wiportal/Tab/42/icscontent/Member/caseloads/enrollment/EnrollmentAt-A-Glance.pdf.space> (accessed and printed on May 21, 2018).

13. Exhibit 12 to this Declaration is a true and correct copy of Clearinghouse Rule 96-154 (CR 96-154), approved and adopted on December 11, 1996, by the Wisconsin Department of Health and Family Services (“DHFS”) (the predecessor to Defendant Wisconsin Department of Health Services (“DHS”)), and implemented on February 1, 1997.

14. Exhibit 13 to this Declaration is a true and correct copy of a document, “Summary of the Amendments to the Medicaid Rules that Discontinue Coverage of Medically Unnecessary Services,” dated January 6, 1995, which was prepared by the Division of Health, Wisconsin Bureau of Health Care Financing in connection with the promulgation of CR 96-154.

15. Exhibit 14 to this Declaration is a true and correct copy of a document, Fiscal Estimate: Medical Assistance: Medically Unnecessary Services, dated September 27, 1996, and an accompanying transmittal document from DHFS, Office of Legal Counsel, to the Legislative Council Rules Clearinghouse, also dated September 27, 1996. These documents were prepared in connection with the promulgation of CR 96-154.

16. Exhibit 15 to this Declaration is a true and correct copy of a webpage on the DHS website, entitled, “LGBT Health – Transgender Persons,” <https://www.dhs.wisconsin.gov/lgbthealth/transgender.htm> (accessed and printed on May 21, 2018).

17. Exhibit 16 to this Declaration are true and correct copies of the following three from DHS’s ForwardHealth Online Handbook at

<https://www.forwardhealth.wi.gov/WIPortal/Subsystem/KW/Print.aspx?ia=1&p=1&sa=85&s=8&c=608&nt=Online+Handbook>, which were accessed and printed on May 23, 2018:

- Topic #560: Breast Reconstruction
- Topic #18257: Reduction Mammoplasty
- Topic #13817: Restorative Plastic Surgery and Procedures

18. Exhibit 17 to this Declaration is a true and correct copy of Center for Excellence for Transgender Health, *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People*, “Binding, packing, and tucking” 155 (Madeline B. Deutsch, MD, MPH, ed., 2d ed. 2016).

19. Exhibit 18 to this Declaration is a true and correct copy of the August 2, 2017 letter sent by DHS to Dean Health Systems Inc., denying the request for preauthorization for coverage of Plaintiff Cody Flack’s mastectomy and chest reconstruction.

20. Exhibit 19 to this Declaration is a true and correct copy of the August 2, 2017 Notice of Appeal Rights sent by DHS to Plaintiff Cody Flack.

21. Exhibit 20 to this Declaration is a true and correct copy of the November 21, 2017 Decision of Administrative Law Judge Brian C. Schneider in Plaintiff Cody Flack’s administrative appeal of Defendants’ denial of medical assistance for a mastectomy and breast reconstruction.

22. Exhibit 21 to this Declaration is a true and correct copy of the December 11, 2017 Order by Administrative Law Judge Brian C. Schneider denying Plaintiff Cody Flack’s request for rehearing in his administrative appeal of Defendants’ denial of medical assistance for a mastectomy and breast reconstruction.

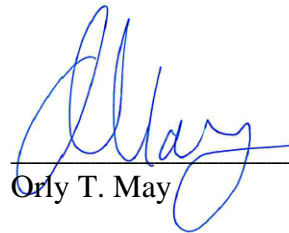
23. Exhibit 22 to this Declaration is a true and correct copy of the September 25, 2017 letter sent by Julie Sager, MD, Medical Director, Bureau of Benefits Management, Division of Medicaid Services, DHS, to the Department of Administration, Division of Hearings and Appeals, and Plaintiff Cody Flack, submitted in connection with Mr. Flack's administrative appeal of Defendants' denial of medical assistance for a mastectomy and breast reconstruction.

24. Exhibit 23 to this Declaration is a true and correct copy of S. James, *et al.*, National Center for Transgender Equality, *Executive Summary of the Report of the 2015 U.S. Transgender Survey* (2016, updated 2017).

25. Exhibit 24 to this Declaration is a true and correct copy of National Center for Transgender Equality, *2015 U.S. Transgender Survey: Wisconsin State Report* (2017).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Executed this 23rd day of May, 2018.

  
Orly T. May